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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Implementation of Section 4(g) of the) MM Docket No. 93-8
Cable Television Consumer Protection)
and Competition Act of 1992)
Home Shopping Station Issues)

To the Commission:

OPPOSITION TO PETITION FOR RECONSIDERATION

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September 30, 1993

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TABLE OF CONTENTS

	<u>Page</u>
Introduction	1
CSC Does Not Demonstrate that Broadcast of Commercial Matter Disserves the Public Interest.....	6
The Commission Cannot Premise a Decision on the Format of Stations' Public Affairs Programs.....	9
The Commission was Under No Obligation To Consider Formats Involving Less Home Shopping Programming.....	10
The Decision Is Not Invalidated by Ex Parte Communications.....	12
The Dingell Letter Is Not Controlling.....	13
There is No Reason to Alter the Commission's Statement Concerning Home Shopping Stations' Entitlement to a Renewal Expectancy.....	15
Conclusion.....	16

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To the Commission:

SUMMARY OF ARGUMENT

The Center for the Study of Commercialism ["CSC"] does not -- nor could it -- challenge the Commission's conclusions with respect to the three specified statutory factors. Instead, it collaterally attacks Television Deregulation.

CSC's plea for reimposition of commercial limits, however, is based solely upon a reflexive negative response to televised commercial matter rather than any reasoned analysis of its impact. Moreover, it comes in the wrong forum: a Commission inquiry will revisit issues relating to commercialization.

CSC's related claim that the format of home shopping stations' public service programming precludes a public interest finding invites the Commission to engage in clearly prohibited regulation of television stations' program formats. As such, it cannot support reconsideration.

CSC's request that the Commission consider alternative home shopping formats also would require prohibited

program content regulation. Moreover, such action is unnecessary in light of the Commission's basic conclusion that home shopping stations as currently formatted can and do operate consistent with the public interest. Finally, **CSC's** request that the Commission ignore or reverse home shopping's affirmative impact on minority television station ownership -- a factor which supported but did not control the Commission's decision herein -- would require it to disregard fundamental national policies.

Contrary to **CSC's** assertions, the Report and Order is not tainted by ex parte communications. **Many** of the letters mentioned in Chairman **Quello's** Statement were properly in the record, and all merely reiterated arguments submitted elsewhere in the record and to which interested parties had a full opportunity to respond.

As to **CSC's** claims concerning consideration of Congressional statements, Section **4(g)'s** legislative history is replete with numerous, often conflicting statements concerning its meaning and Congressional intent. In such circumstances, the Commission has broad interpretative discretion; CSC makes no showing that this discretion has been abused.

Finally, **CSC's** requested interpretation of the relationship between a home shopping format and a station's renewal expectancy is contradicted by Section **4(g)'s** plain language. There is thus no reason for the Commission to alter its interpretation of this provision.

- 1

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To the Commission:

OPPOSITION TO PETITION FOR RECONSIDERATION

Jovon Broadcasting Corporation ["Jovon"], licensee of Television Station WJYS, Hammond, Indiana, submits herewith its Opposition to the petition for reconsideration of the Commission's Report and Order in the above-captioned proceeding^{1/} filed by the Center for the Study of Commercialism ["CSC"].^{2/}

Introduction

The Notice of Proposed Rulemaking herein^{3/} implemented Congress' direction that the Commission determine whether home shopping stations like WJYS are operating in compliance with the public interest,

^{1/} Report and Order, MM Docket No. 93-8, FCC 93-345 (July 19, 1993) ["Report"].

^{2/} 58 Fed. Reg. 48368 (September 15, 1993).

^{3/} Notice of Proposed Rulemaking, MM Docket No. 93-8, 8 FCC Rcd 660 (1993) ["Notice"].

convenience **and** necessity so that they are entitled to mandatory cable carriage. 47 U.S.C. § 533(g) [**"Section 4(g)"**]. After thorough consideration of a voluminous record, in which the "overwhelming majority" of comments supported must-carry status for home shopping stations, the Commission **concluded** that such stations do serve the public interest and hence qualify **as** local commercial television stations for purposes of mandatory cable carriage.⁹

This conclusion was **supported** by specific findings with **respect to three** factors mentioned by the statute. First, the Commission concluded that home shopping stations have significant viewership. **Report** at par. 6. Second, it held that competing spectrum demands are adequately resolved through the existing renewal system and the initial licensing **process**, finding that competing demand for spectrum used by home shopping television stations is **"minimal."** **Id.** at par. 12. Finally, the Commission **concluded that "...home shopping broadcast** stations play a role in providing competition for nonbroadcast services supplying similar programming." **Id.** at par. 23.

Additional public interest factors **also supported** the Commission's decision. The Commission revisited the

4/ **Report** at par. 2 .

assumption⁸ supporting Television Deregulation^{5/} and determined that they continue to be valid, finding that "...the record clearly demonstrates that market forces have revealed a desire among a significant number of television viewers for home shopping programming." Report at par. 27. It also specifically found that "...home shopping stations provide an important service to viewers who either have difficulty obtaining or do not otherwise wish to purchase' goods in a more traditional manner." Id. at par. 28.

The Commission also reviewed submissions of stations with home shopping formats like **WJYS** which demonstrated in detail their record of public service: it concluded that "...the chosen format of home shopping stations generally does not preclude them from adequately addressing the needs and interests of their communities of license." Id. at par. 32.

Finally, the Commission found that the availability of home shopping formats had facilitated minority television station ownership and that "...minority-controlled licensees of home shopping stations enhance the diversity of views and information available to the public." Id. at par. 34. Jovon submitted information supporting that

5/ Report and Order, MM Docket No. 83-670, 98 FCC 2d 1076 (1984) ["Television Deregulation"], recon. denied, Memorandum Opinion and Order, 104 FCC 2d 358 (1986), aff'd in part and remanded in part sub. nom., Action for Children's Television v. FCC, 821 F.2d 741 (D.C. Cir. 1987).

conclusion **and** here reiterate its accuracy and compelling nature.

CSC -- virtually the only party to oppose home shopping stations' must-carry status and the only entity to seek reconsideration of the **Report**^{6/} -- submits nothing to indicate any error in the **Report's** conclusions. Instead, it simply repeats its earlier arguments which ask the Commission to **reverse** its public interest determination because of its totally unsubstantiated claim that the broadcast of commercial material conflicts with the public interest. CSC also asks the Commission to premise reconsideration on **a** judgment concerning the format in which home shopping stations' public affairs programming is presented. Such action is clearly barred by the First Amendment and Section 326 of the Communications Act of 1934, as amended.

CSC **also raises questions** concerning the procedural propriety of the Commission's decision, attacking Chairman **Quello's** concurrence **as having been based** upon impermissible **ex parte** communications from members of the **public.**^{7/} However, the majority of the letters to which

^{6/} **See** FCC Public Notice, Report No. 1964 (September 9, 1993) ..

^{7/} Ironically, CSC **also** complains about the **Commission's** failure **to accord dispositive** weight to a letter from Congressman Dingell, which was also submitted after the
(continued...)

CSC refers were in fact placed in the record. More significantly, they were merely duplicative and particularized examples of general matters which were part of the **record** (and indeed are specifically referenced in the Commission's decision) and thus even if they could be considered **ex parte**, did not **impermissibly** taint the decision. Moreover, the issues with which those letters dealt involved but one minor and non-decisional aspect of the **Report**, and thus were immaterial to the **rulemaking's** resolution. **CSC's ex parte** claims thus do not affect the validity of the Commission's decision herein.

Finally, CSC objects to the Commission's conclusion at paragraph 36 of the **Report** that home shopping stations will not automatically **be** disqualified from receiving a renewal expectancy. This objection is curious, in that the Commission discussed this issue specifically in response to **CSC's** own comments. It is likewise contrary to Congress' express instructions.

CSC's petition, in short, presents no basis for the reconsideration which it requests.

1/ (...continued)
close of, and was not included within the proceeding's record.

CSC Does Not Demonstrate that Broadcast of
Commercial Matter Disserves the Public Interest

CSC does not challenge the Commission's conclusions with respect to the three specific factors whose consideration is prescribed by Section 4(g), conclusions which formed the basis of its decision to accord home shopping stations status as "local" stations for must-carry purposes. Instead, reflecting an emotional but still unsubstantiated dislike of broadcast commercial material, CSC collaterally attacks the Report by again^{8/} in effect asking the Commission to reconsider its Television Deregulation decision to reimpose limits on the telecast of commercial matter.^{9/} The Report properly rejected CSC's initial request that the Commission do so, and CSC's

8/ CSC continues to support this claim by reference to a colloquy involving Congressmen Dingell (not, as CSC erroneously states, Congressman Markey) and Eckart. However, as the principal sponsors of the Senate amendment which became Section 4(g) have noted, "...the House of Representatives had no hearings or debate on this matter [while] the Senate considered the issue extensively both in committee and on the Senate floor." Letter from Senator Bob Graham et al. to Chairman Quello, June 30, 1993. The Dingell-Eckart colloquy is but one small part of extensive legislative history. The controlling consideration is, however, the language of the statute itself. And that language does not compel or even permit the result CSC seeks.

9/ It should be noted in this regard that the Commission has recently instituted rulemaking proceedings to reevaluate the issue of television commercial limits. See Notice of Inquiry, MM Docket No. 93-254, FCC 93-459. That proceeding affords the appropriate forum for CSC to express its concerns, not this reconsideration proceeding.

petition for reconsideration affords no basis to change that result.^{10/}

CSC's position rests upon its belief that the broadcast of commercial matter, standing alone, is necessarily contrary to the public interest. This claim, in turn, is premised upon rote reiteration of now-invalid decisions supporting limitations on the amount of commercial matter which stations may broadcast.^{11/}

Significantly, neither those decisions nor CSC have ever even attempted any specific analysis, discussion OR explanation of precisely why commercial matter is inconsistent with the public interest. What is inherently wrong, bad, or otherwise irreconcilable with the public interest about broadcast material which seeks to sell legal

^{10/} CSC claims at page 5 of its Petition that the Commission could not have foreseen that Television Deregulation would have resulted in adoption of home shopping formats. The Commission long ago rejected this assertion, noting that "HSN, with its unique programming fare, method of generating revenues, and operational approach, would appear to be the kind of innovative enterprise the Commission was encouraging in [Television Deregulation]." Home Shopping [Network] [sic], Inc., 4 FCC Rcd 2422, 2423 (1989).

^{11/} CSC's reliance on concerns with commercialization which existed many years ago fails to reflect the changing standards applicable to broadcast programming. Much material now routinely available on the air would not have been acceptable twenty years ago. Similarly, the broadcast of commercial matter at a time when broadcasting was still relatively new and operated in a far less competitive atmosphere involved different societal values than exist today when advertising is virtually universal in its media presence.

products or services? Why is it less consistent with the public interest for a station to air **55-1/2** minutes of commercial material in an hour than **55-1/2** minutes of a violent movie like **"Rambo,"** an afternoon soap opera, a game show which urges contestants to win product prizes, or a talk show on sexually-oriented topics like **"Geraldo?"** What in the First Amendment would permit the *Commission* to determine that presentation of **"Days of Our Lives," "Oprah Winfrey," "Heavyweight Wrestling"** and **"G.I. Joe"** is more consistent with the public interest than presentation of HSN programming? How would such a determination be made or justified?

CSC has **never** answered these questions. It has never cited any studies which demonstrate adverse effects associated with the airing of commercial material to adults. In the case of violent programming, where there is substantial evidence **of** adverse societal **consequences,**^{12/} Congress has hesitated to engage in outright program regulation or restriction because of First Amendment concerns.^{13/} Jovon respectfully submits that there should be even greater hesitation -- in fact, complete forbearance

^{12/} **See, e.g.,** "Violence on Television," Hearing **before** the Subcomm. on Crime and Criminal Justice of the House Committee on the Judiciary, **102d** Cong., 2d Sess. (December 15, 1992).

^{13/} **See, e.g.,** H.R. 2159, 103rd Cong., 1st Sess. (May 19, 1993) .

-- in the case of regulation of legitimate commercial material where there is absolutely **no** concrete evidence of adverse societal impact associated with its **broadcast.**^{14/}

**The Commission Cannot Premise a Decision
on the Format of Stations' Public Affairs Programs**

CSC's principal substantive objection to the decision rests on its claim that the **4-1/2** minute format of much of home shopping stations' public service programming^{15/} does not serve the public interest. Significantly, CSC does not challenge the uncontroverted demonstration in the record herein that the amount of public service programming such stations air exceeds the only quantitative programming guidelines the Commission has adopted. Its only quarrel is with the format of that programming.

The Commission may not accept **CSC's** invitation to regulate program content. It is **hornbook** law that the Commission cannot become involved in decisions concerning

14/ Moreover, as the initial **comments** of Jovon, Roberts and a number of other parties demonstrated, the availability of a home shopping format has had positive societal benefits in facilitating increased minority ownership and thus increased diversity.

15/ As the record reflects, home shopping stations also present more traditional long-form public service programming.

matters such as stations' programming **formats**,^{16/} and **CSC's** objections to the effectiveness of home shopping stations' public service programming based solely upon its **length**^{17/} thus afford no basis for reconsideration of the **Report**.

**The Commission was Under No Obligation
To Consider Formats Involving Less Home Shopping Programming**

CSC also criticizes the Commission for failing to consider whether the benefits of home shopping formats (which CSC at last apparently concedes) could still be achieved if stations aired less home shopping programming.^{18/} This objection, however, fails to note that the Commission's decision principally relies on its findings as to Section 4(g)'s three specific criteria; the agency's ancillary finding of benefits afforded additional support for its decision but was not determinative of the ultimate result.

^{16/} See, e.g., **FCC v. WNCN Listeners' Guild**, 450 U.S. 582 (1981); **WGBH Educational Foundation**, 69 FCC 2d 1250 (1978); **WPIX, Inc.**, 68 FCC 2d 381 (1978); **Multi-Com, Inc.**, 72 FCC 2d 198 (1979); **Kaye-Smith Enterprises**, 71 FCC 2d 1402 (1979).

^{17/} The difficulties inherent in the distinctions CSC asks the Commission to draw are illustrated by **CSC's** own failure to suggest what length of public service programming might be effective. CSC likewise fails to suggest a constitutional justification for this type of content regulation.

^{18/} CSC does not suggest what level of programming might accomplish this goal or how the Commission would make such a determination.

In any event, there was and is no requirement that, having determined **that** home shopping stations' current format permits satisfaction of public interest obligations, **the** Commission also consider whether alternative formats might also do so. The Commission found that Section **4(g)'s** three factors supported must-carry rights for home shopping stations. It found that home shopping stations like WJYS are serving the public interest through public service programming, the principal component of stations' public interest obligations. That it also acknowledged ancillary minority and related ownership benefits in addition **to these** findings does not require any determination that similar benefits could have been achieved under different program formats. Indeed, any suggestion that stations reduce the amount of **time** devoted to home shopping programming would **be** content regulation clearly prohibited by the First Amendment as well as the Communications Act.

CSC's suggestion reflects an apparent belief that now that the benefits of **a** home shopping format have been realized by some, minority-owned and other start-up stations should be forced **to** restructure their operations. **CSC's** dislike of the home shopping thus goes too far. Congress has recognized the clear public interest **in** facilitating **enhanced** opportunities for minority ownership. The home shopping **format** has furthered these **Congressionally-**

recognized goals. The premise for **CSC's** reconsideration request runs squarely against them. That request must therefore be denied.

**The Decision Is Not Invalidated by
Ex Parte Communications**

CSC also charges that Chairman **Quello's** vote was based on impermissible **ex parte** communications. **This** assertion, in turn, is premised upon the references in Chairman **Quello's** Separate **Statement^{19/}** to a number of letters from members of the public which "...urged us to find that home shopping stations serve the public interest in the same way as broadcaster⁸ with more traditional formats -- by providing information vital to their communities."^{20/} In that regard, the letters simply amplify information which was already in the record in formal comment submission[&] to which CSC had ample opportunity to, and did, reply.

Chairman **Quello** also quotes several individual letters which gave specific examples of the way in which

19/ These letters were also mentioned in Commissioner **Duggan's** Dissenting Statement.

20/ Half of the referenced letters were in fact placed in the record on June 29, 1993, **identified** as **ex parte** communications. It **should** be noted that CSC also filed an **ex parte communication** on June 30, 1993.

21/ **See, e.g.,** the Comments of the various Silver King Communications, Inc. owned and operated stations: Comments of HSN.

home shopping stations assist persons with disabilities and the elderly and afford alternatives to cable home shopping services. Again, those letters merely duplicate or particularize claims already in the record from other parties.^{22/} CSC thus had notice of and the opportunity to address them (it did not, see Report, par. 28).

In short, Chairman **Quello's** references to letters received from members of the public did no more than indicate the existence of additional material which merely supported information which was already in the record and which could have been addressed by the parties. **CSC's** claims of impermissible ex parte influence afford no basis for reconsideration.

The Dingell Letter Is Not Controlling

CSC's final claim for reconsideration is based on its assertion that Chairman **Dingell's** June 22, 1993, letter to Chairman **Quello** should have controlled the Commission's

^{22/} See, e.g., Report, paragraph 28, no. 84 ["Several commenters state that they provide valuable services to the disabled and others confined to their homes, the elderly, families without time to shop by other means, people without ready access to retail outlets or whose outlet8 do not stock the good8 they want, people without car8 or other transportation, people who dislike shopping and people who are afraid of violent crime in conventional shopping areas."]; pars. 16, et seq. Finally, a number of the letter8 submitted in the docketed ex parte communications referred to above also confirmed these claims. See, e.g., Letter8 from Harold V. Bratt; "T.H.J.;" Belle R. Mest; Mrs. James Reed.

decision.^{23/} That letter, written post-enactment by a single, albeit important and influential, Congressman, is but one part of the voluminous and often conflicting legislative history of the 1992 Cable Act in general and Section 4(g), in particular. It is well established, however, that the Commission has wide latitude in interpreting its statutory mandate, and that in the absence of a gross abuse of discretion or disregard **for** specific statutory language, that latitude is accorded significant deference.^{24/} Further, while legislative history may afford some guidance as to Congressional intent, a single post-enactment letter does not constitute controlling interpretative material.^{25/} Indeed, other members of

23/ CSC cites no authority for its apparent belief that every communication from Congress must be specifically considered in **Commission** rulemaking decisions. It should be noted that Chairman **Dingell's** interpretation of the statute -- that urged by CSC -- was in fact considered but rejected by the Commission.

24/ See, e.g., Orange Park Florida TV, Inc. v. FCC, 811 F.2d 664 (D.C. Cir. 1987); City of New York Municipal Broadcasting System v. FCC, 744 F. 2d 827 (D.C. Cir. 1984), cert. denied, 470 U.S. 1084; National Railroad Passenger Corp. v. Boston and Maine Corp., 112 S. Ct. 1394 (1992); Rivera Cir. Cruz v. INS, 948 F.2d 962, reh. denied, 954 F.2d 723 (5th 1991).

25/ See, e.g., Sutherland on Statutory Construction (5th ed., 1992) § 48.10 ["...committee statements made after the statute has been passed cannot retroactively provide legislative history or *an* interpretation contrary to the intent at the time of enactment."]; § 48.16 ["...postenactment statements made by a legislator as to legislative intent do not become part of the legislative history of the original enactment."].

Congress, concluding Congressman Towns, Congressman Hughes, Congresswoman Brown, also submitted letters reflecting different views of Congressional **intent.**^{26/} There are, in **short**, divergent Congressional views of the legislation. And it is the Commission's role to finally interpret those views.

CSC makes no showing that the Commission's decision offends the Cable Act's statutory language or otherwise represents an abuse of the **Commission's** interpretative discretion. Chairman **Dingell's** position is but *one of many* possible interpretations of the legislation and was considered by the Commission (albeit *not with* specific reference to his letter): it need not be the only one.

**There is No Reason to Alter the Commission's
Statement Concerning Home Shopping Stations'
Entitlement to a Renewal Expectancy**

CSC, finally, asks the Commission to withdraw its holding that home shopping stations will not be denied a renewal expectancy because of their home shopping format. Astoundingly, it makes this request even though the statement in question was issued in response to its own argument. In short, its position having been rejected by

26/ CSC makes no showing why the FCC should ignore these equally valid Congressional views.

the Commission, CSC now wants the Commission to delete that rejection **from** the record.

CSC's request was and is flatly contradicted by the language of the Cable Act, which indicates that the Commission "...shall not deny such [home shopping] stations a renewal expectancy solely because their programming consisted predominantly of sales presentations or program length commercials." The Commission's rejection of **CSC's** claims **merely** held that the statute means what it says.

Conclusion

CSC's Petition for Reconsideration simply continues its unsupported campaign against stations having a home shopping format. It presents absolutely no basis for a change in the rules adopted by the **Report**.

Jovon Broadcasting Corporation therefore respectfully **requests** that the Commission affirm its **Report and Order** herein in all respects and to dismiss **CSC's** petition for reconsideration.

Respectfully submitted,

JOVON BROADCASTING CORPORATION

By


Joseph Stroud

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CERTIFICATE OF SERVICE

This will certify that a complete **copy** of the foregoing **"Opposition** to Petition for Reconsideration" was sent this 30th day of September, 1993, via first class United States mail, postage prepaid, to the following:

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September 30, 1993